

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL M. LONGSTAFF

Claimant

VS.

CITY OF TOPEKA

Self-Insured Respondent

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Docket No. 1,000,737

ORDER

Claimant appealed the July 1, 2004 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on December 7, 2004, in Topeka, Kansas.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Larry G. Karns of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Although the Judge listed a March 20, 2002 preliminary hearing transcript as part of the record in this claim, the parties agreed that it only dealt with another claim filed by claimant and need not be considered for purposes of the Award entered in this claim.¹

ISSUES

This is a claim for an October 26, 2001 accident and resulting low back injury. In the July 1, 2004 Award, Judge Benedict concluded claimant had failed to prove she sustained any functional impairment due to the October 26, 2001 accident. Consequently, the Judge denied claimant's request for disability benefits.

Claimant contends Judge Benedict erred. Claimant argues she permanently aggravated her low back in the accident and sustained an additional eight percent functional impairment to the whole person. Accordingly, claimant requests the Board to

¹ R.H. Trans. at 3-4.

modify the July 1, 2004 Award and grant her benefits for an eight percent permanent partial general disability.

Conversely, respondent contends the July 1, 2004 Award should be affirmed. Respondent argues the October 26, 2001 accident merely caused a temporary flare-up of symptoms and, therefore, claimant sustained no additional permanent functional impairment as a result of the incident.

The only issue before the Board on this appeal is whether claimant sustained any additional permanent injury due to her October 26, 2001 accident and, if so, to what extent.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. At the time of the April 2004 regular hearing, claimant was 61 years old and had retired from the City of Topeka, where she had worked for approximately 15 years.
2. On October 26, 2001, claimant lifted a stack of files from the floor to a desk and experienced sharp low back pain. Shortly afterwards, claimant had pain radiating from her low back down to her left knee and occasionally to her heel.
3. Claimant eventually reported the incident to her supervisors and was taken to St. Francis Hospital for treatment. Claimant was given physical therapy and told to follow up with Dr. Craig Yorke, who had previously operated on claimant's low back. Claimant did not pursue additional treatment from Dr. Yorke as she was dealing with other problems stemming from a bilateral carpal tunnel syndrome workers compensation claim involving the City of Topeka. Accordingly, other than taking over-the-counter medications, claimant has not received any additional treatment for her back following her last physical therapy session in November 2001.
4. But this was not the first time that claimant had experienced problems with her low back. In approximately 1989 or 1990, claimant began experiencing low back problems and in February 1991 underwent low back surgery. Following surgery, claimant experienced low back pain and pain and numbness radiating into her right leg, foot, and toes. In 1995, claimant experienced increased low back pain and again sought medical treatment. Claimant has had other instances when she experienced flare-ups in low back pain but she does not recall the dates. Claimant does not recall missing any work or seeking any additional medical treatment due to her low back between 1995 and October 2001. Moreover, claimant does not recall having any left leg symptoms before her October 2001 incident at work.

5. Claimant last worked for the City of Topeka on November 23, 2001, before retiring effective December 1, 2001.
6. Claimant's attorney hired board-certified orthopedic surgeon Edward J. Prostic, M.D., to evaluate claimant. The doctor examined claimant in January 2004 and concluded claimant's October 2001 accident had more likely than not aggravated a preexisting condition in claimant's low back at the L5-S1 intervertebral space "where she now has occasional S1 radulopathy [sic] that is most likely from lateral recess entrapment."²
7. Dr. Prostic further concluded claimant sustained an additional eight percent functional impairment to the whole person due to the October 2001 accident, which he determined by utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). The doctor justified using the Guides' Range of Motion Model, as follows:

Q. (Ms. Fisher) And what guides or guidelines did you consult in making that determination [functional impairment opinion]?

A. (Dr. Prostic) The AMA Guides, Fourth Edition.

Q. I know that we went through this a number of different times, but do they allow for two alternative methods to determine permanent impairment of function?

A. Yes.

Q. In looking at the AMA Guides, do they give you any guidance as to which method to use in cases where there is any pre-existing injury?

A. First of all, the Fourth Edition you are to use either the DRE method or the Range of Motion Model, whichever we believe is more accurate in this case. And if the two are both permitted, it asks us to use the higher of the two. Since the Fourth Edition, which was obviously enacted into law by the State of Kansas, there has been a Fifth Edition and there have been a number of other publications by the AMA, one I'll show you is the Master of the AMA Guides, Fifth, another is a series of publications called the Guides Newsletter (indicating), and these have given further guidance on how to properly use the Guides. The authors of the Fifth Edition and of the subsequent publications have told us that when there is repetitious injury to the same area, that we should not use the DRE method, we should use the Range of Motion Model.

² Prostic Depo., Ex. 1 at 3.

Q. And you said specifically that the Fourth Edition indicates that you can use either one but you're suppose[d] to use the higher of the two?

A. Yes.

Q. Can you cite for us specifically where that is?

A. Well, the specific answer from the Guides, Fourth Edition, is from Page 99 and at the bottom of the column on the left it says, "If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the Range of Motion Model. Then the proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the Range of Motion Model." In the book Master, the AMA Guides Fifth, on Page 180, it says --

. . . .

A. In the few instances in which the range of motion and DRE methods can both be used to evaluate the individual with both methods and award the higher rating.³

8. Respondent, on the other hand, hired board-certified orthopedic surgeon Phillip L. Baker, M.D., to evaluate claimant. The doctor saw claimant in April 2004 and concluded claimant had a 10 percent whole person functional impairment using the DRE (Diagnosis-Related Estimates) Model but a 17 percent whole person impairment using the Range of Motion Model set forth in the *AMA Guides* (4th ed.).
9. After reviewing claimant's medical records from her 1991 back surgery, which encompassed a bilateral discectomy and hemilaminectomy at L4-5, Dr. Baker concluded claimant sustained no additional functional impairment due to her October 2001 incident. According to Dr. Baker, claimant's October 2001 incident was only a minor event with claimant's symptoms resolving in a short period of time. And the doctor believes claimant's ongoing symptoms in the left leg are due to a natural progression of the degenerative disc disease and facet disease in claimant's spine.
10. Dr. Baker also testified that using the *Guides'* Range of Motion Model was more appropriate in this case than using the DRE Model. The doctor testified, in part:

Q. (Ms. Fisher) You provided the rating per the range of motion model [in] the Fourth Edition, and in your report you indicate that you believe that is the more appropriate alternative to use in this case, correct?

³ Prostic Depo. at 10-12.

A. (Dr. Baker) I did.

Q. Can you tell me why the range of motion model was more appropriate in this situation?

A. There's a long history of difficulty with this lady and so we would expect there's going to be some alterations in range of motion as a result of all of that. And that the DRE model for just one could say she has a radiculopathy is -- does not account for the duration of symptoms.

Q. The Fifth Edition I believe indicates that when you have repetitive injuries, the range of motion model is the more appropriate model, is that correct, the Fifth Edition of the AMA?

A. The Fifth Edition, yes. The Third Edition was heavy on range of motion. Fourth Edition took it away until we get the cases like this and the Fifth is bringing it back, and that particular part of it is already causing a fire storm because range of motion is not an exact science and that's a problem.

Q. But it specifically indicates that's the better model to use when there's repetitive injuries?

. . . .

A. I just know that what studying I've done of that getting ready because I thought we'd go to it is that it's back again.

Q. (By Ms. Fisher) Okay.

A. I don't know the answer to the second part of your question.

Q. Nevertheless, you felt that the best evaluation of this woman's true impairment was the range of motion model?

A. I did.⁴

11. The Board concludes claimant has sustained additional functional impairment due to the low back injury she sustained on October 26, 2001, while working for respondent. The Board is persuaded by Dr. Prostic's testimony, which establishes that claimant has new radiographic findings and an impairment that stems from a lower disc level than that involved in her February 1991 surgery. Moreover, Dr. Prostic's opinions are more consistent with claimant's testimony about her ongoing symptoms and how her symptoms developed. Dr. Baker's opinion that claimant's

⁴ Baker Depo. at 19-21.

symptoms returned to their pre-accident level is not supported by claimant's testimony.

12. The Board notes there are problems in determining the extent of permanent impairment arising from a specific accident using the *Guides'* Range of Motion Model when, more than likely, a loss of motion preexisted the accident. But, to some extent, those same problems exist when evaluating an injury using the *Guides'* Diagnosis-Related Estimates Model. Considering the entire record and both doctors' testimonies, the Board concludes the additional functional impairment that claimant sustained due to her October 26, 2001 accident falls somewhere between the zero and eight percent ratings provided by the doctors. The Board averages those ratings and concludes claimant sustained an additional four percent functional impairment to the whole person due to the October 26, 2001 accident.

CONCLUSIONS OF LAW

Because claimant has sustained an injury that is not listed in K.S.A. 44-510d, her permanent partial general disability is governed by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. **In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

Claimant does not contend that she is entitled to a permanent partial general disability greater than her functional impairment rating. Accordingly, claimant's permanent partial general disability from the October 26, 2001 accident is four percent. Consequently, the July 1, 2004 Award should be modified.

AWARD

WHEREFORE, the Board modifies the July 1, 2004 Award and grants claimant disability benefits for a four percent permanent partial general disability.

Carol M. Longstaff is granted compensation from the City of Topeka for an October 26, 2001 accident and resulting disability. Based upon an average weekly wage of \$509.63, Ms. Longstaff is entitled to receive 16.60 weeks of permanent partial general disability benefits at \$339.77 per week, or \$5,640.18, for a four percent permanent partial general disability, making a total award of \$5,640.18, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Larry G. Karns, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director